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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 561

Case No. 596: EDUSSURIYA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Samar Sen; Mr. Mikuin Leliel Balanda;

Whereas at the request of Ananda Edussuriya, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 October 1988, 31 March, 30 June, 31 August, 31 October, 31 December 1989, 30 April, 30 September, 31 December 1990 and 31 March 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 March 1991, the Applicant filed an application containing the following pleas:

"II. PLEAS

1. Because of the lack of due process in connection with the non-renewal of his fixed-term appointment, Applicant pleads the following:

(a) that the decision to withhold his 1984 within-grade increment be rescinded;

(b) that, consequently, the amount of the award already paid to the Applicant by the Secretary-General of three months net base salary at local level 6, step IV, at the rate in effect upon separation, be increased by the difference of the same award at local level 6, step V;

(c) that, as unanimously recommended by the Panel of the Joint Appeals Board, an additional amount be paid to the Applicant, corresponding to three months net salary at the rate in effect upon separation, and also at local level 6, step V."

Whereas the Respondent filed his answer on 12 June 1991;

Whereas the Applicant filed written observations on 29 April 1992;

Whereas the facts in the case are as follows:

Ananda Edussuriya entered the service of UNDP on 1 January 1980. He was initially offered a three-month fixed term appointment as a local recruit at level 6, step I at the UNDP Office in Colombo, Sri Lanka. His appointment was extended first, for a fixed-term of one month and then, for two successive fixed-terms, through 30 April 1982 and through 30 April 1984, when he was separated from the service of UNDP.

According to the Applicant's personnel file, the Applicant's performance during the period from 1 January to 31 December 1980, was initially evaluated in an incomplete Performance Review and Staff Development Report (performance report) which was not signed by the Resident Representative. In this report, the Applicant was rated by his immediate supervisor, the Senior Finance Assistant as "a staff member whose performance does not meet expected standards in all respects". Commenting on the ratings given by the immediate supervisor, the Assistant Resident Representative then in office, who was also the Second Reporting Officer, stated that these comments "should have been done more carefully" and that the evaluation was "careless and negligent". He described the Applicant "as a very conscientious, reliable and competent staff member who carries out duties entrusted to him expeditiously and without or with minimum supervision".

In a second performance report, also evaluating the Applicant's performance from 1 January 1980 to 28 February 1982, the same immediate supervisor rated the Applicant as "a competent and well-qualified staff member whose performance meets expected standards on the present level". She specified that her comments in this report referred only to the period from 1 January 1981 to 28 February 1982. The Third Reporting Officer, the Resident Representative, noted in his comments dated 19 February 1983, that it was not "the staff member's job skills" but "the application of his knowledge" and his "attitude in the conduct of collective work" which were at issue.

During his employment with UNDP, the Applicant was granted within-grade salary increments, due in accordance with staff rule 103.8, with effect from 1 January 1982 and 1 January 1983. In evaluating the Applicant's performance to determine whether the increments were due, the Applicant's immediate supervisor had stated in December 1981 and in December 1982, that the Applicant's performance had been "average". In a letter dated 6 January 1982, informing the Applicant that he had decided to award him the increment, the Resident Representative stated: "Do keep up with the good work". On 17 January 1983, he noted: "I hope the future will show a greater productivity and enthusiasm in your performance".

On 8 April 1983, the Resident Representative ad interim wrote to the Applicant that he had not been selected for the post of Finance Assistant, for which he had applied. He added that his superiors would "continue to watch [his] job performance ... the major factor in determining [his] future career development". He referred to the fact that his superiors had discussed his performance with the Applicant and had "made it clear ... that [they felt his] performance could and should considerably improve before a promotion [could] be considered."

On 13 December 1983, the Assistant Resident Representative wrote to the Applicant to draw his attention to a number of lapses in the discharge of his functions. He expressed his concern at the Applicant's "apparent lack of responsibility", pointing out that if he did "not improve [his] performance" UNDP would not be in a position to extend his appointment. In a confidential memorandum to the Resident Representative dated 19 December 1983, the Senior Finance Assistant highlighted a number of shortcomings in the Applicant's performance. In a handwritten note on the memorandum, the Assistant Resident Representative recommended the non-renewal of the Applicant's appointment.

On 29 December 1983, the Resident Representative ad interim notified the Applicant that, in view of his performance and since the communication of 13 December 1983, referred to above, "indicated no subsequent improvement in [his] performance and attitude", he had decided not to award him the annual within-grade salary increment due in January 1984.

In communications dated 4 and 11 January 1984, the Applicant wrote to the Assistant Resident Representative setting forth his own assessment of his performance and duties and contesting the decision to withhold his within-grade salary increment.

On 9 March 1984, the Resident Representative informed the Applicant that his fixed-term appointment, which was due to expire on 30 April 1984, would not be extended. In a letter dated 22 March 1984, the Applicant asked the Resident Representative to reconsider that decision. On 6 April 1984, the Resident Representative informed the Applicant that his decision would be maintained. He had studied the Applicant's case thoroughly and had concluded that although the Applicant's "technical competence [was] adequate", his "attitude" towards his job and his performance were not satisfactory.

On 5 April 1984, the Applicant wrote to the Director of Personnel, United Nations Headquarters, requesting administrative review of the decision not to extend his appointment. On 14 May 1984, the Chief of the Administrative Review Unit of the Division of Personnel Administration acknowledged receipt of the Applicant's request and informed him of the procedure to be followed if a formal review was not completed within two months. Having received no further reply, on 21 August 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decisions to withhold his within-grade salary increment and not to renew his fixed-term appointment. The JAB adopted its report on 2 June 1988. Its findings and recommendations read as follows:

"Findings and Recommendations

47. The panel unanimously:

(a) Found that the administrative decisions contested by the appellant were vitiated by extraneous factors, especially a personality conflict which created a situation which could and should have been remedied,

(b) Found that proper procedure had not been followed regarding the withholding of the appellant's annual within-grade salary increment due in January 1984,

(c) Found that there existed, to some extent, an expectancy of renewal of the appellant's fixed-term appointment and that administrative irregularities had surrounded the decision to separate him from service,

(d) Found that the appellant suffered as a consequence of the inordinate delay between the date on which he asked the Secretary-General to review the

impugned decision and the date on which the Representative of the Secretary-General submitted the Respondent's reply."

48. For these reasons, the Panel unanimously:

(a) Recommended that the decision withholding his January annual within-grade salary increment be rescinded,

(b) Recommended that an amount corresponding to three months net salary be paid for the consequences of his separation from service based on wrongful grounds,

(c) Recommended that an additional amount corresponding to three months net salary be paid to the appellant in compensation for the detrimental consequences of the above-mentioned inordinate delay.

49. The Panel made no further recommendation in support of the appeal."

On 10 June 1988, the Under-Secretary-General for Administration and Management informed the applicant that:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision of non-renewal of your fixed-term appointment which was validly taken. The Secretary-General noted in this connection that the Resident Representative of the UNDP Office in Sri Lanka had notified you on 9 March 1984 that your appointment would not be renewed upon its expiration date of 30 April 1984 because your performance had not improved during previous months. Therefore, you could not reasonably expect renewal of your contract. Furthermore, there is no concrete evidence on the record which would substantiate that this decision was vitiated by extraneous factors or personality conflicts.

However, in view of the irregularities concerning the withholding of your 1984 within-grade increment and the delays, the Secretary-General has decided to award you three months' net base salary at local level 6, step IV, at the rate in effect upon your separation as appropriate compensation in final settlement of your case and to take no further action on the matter.

The above-mentioned decision of the Secretary-General is 'the final decision on the appeal' mentioned by staff rule 111.2(o). Therefore, any further recourse you might wish to file should be addressed to the Administrative Tribunal."

On 28 March 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas, the Applicant's principal contentions are:

1. The amount of the award already paid to the Applicant by the Respondent of three months' net base salary at local level 6, step IV, at the rate in effect upon separation, should be increased by the difference of the same award at local level 6, step V.

2. The Respondent should pay to the Applicant an additional amount of three months' net base salary at the rate in effect upon separation, also at local level 6, step V, as recommended by the JAB.

Whereas the Respondent's principal contention is:

The decision not to award to the Applicant a within-grade salary increment was based upon the Applicant's performance and, although all procedures were not followed, was not improperly motivated.

The Tribunal, having deliberated from 12 June to 1 July 1992, now pronounces the following judgement:

I. The Tribunal notes, first, that although the dispute between the parties arose when the Administration refused to renew the Applicant's fixed-term appointment, the Applicant has not impugned that specific decision. He requests the Tribunal:

(a) to rescind the decision to withhold his within-grade increment due in 1984;

(b) to increase the amount of the award paid to him by the Secretary-General consisting of three months' net base salary at local level 6, step IV, at the rate in effect upon separation, by the difference between that amount and salary at local level 6, step V;

(c) to pay the Applicant an additional amount corresponding to three months' net base salary at the rate in effect upon separation, also at local level 6, step V, as unanimously recommended by the Joint Appeals Board (JAB).

II. With regard to the Applicant's first plea, the Tribunal notes that, as the record indicates, the Applicant was repeatedly made aware of the

shortcomings of his performance through the various performance reports prepared by his supervisors; the Resident Representative, for example, noted in his report dated 19 February 1983, that:

> "The core issue ... is not [the Applicant's] job skills, for his technical competence is well established; it is more the application of his knowledge and the question of attitude in the conduct of collective work ... I have much sympathy with the supervisor's difficulty in securing the staff member's full cooperation in expanding his usefulness to the wider interest of the Finance Section. The staff member on his part has reassured me of his understanding of the importance of this aspect of his work and pledged his unstinted cooperation."

Furthermore, one of the Applicant's supervisors also noted, in another report dated 17 January 1983: "I hope the future will show a greater productivity and enthusiasm in your performance". Likewise, on 13 December 1983, the Assistant Resident Representative drew the Applicant's attention to a number of lapses in the discharge of his functions. He expressed his concern at the Applicant's "apparent lack of responsibility" and put him on notice that if he did "not improve [his] performance", UNDP would not be in a position to extend his appointment.

The Tribunal notes that, on 29 December 1983, the Resident Representative ad interim notified the Applicant that he had decided not to award him the annual within-grade salary increment due in January 1984, in view of his performance and, as the communication of 13 December 1983, referred to above, indicated "no subsequent improvement in [his] performance and attitude".

III. It follows from the above that it was for objective and non-discriminatory reasons, namely, inadequate performance, of which the Applicant was repeatedly made aware, that his supervisors decided not to award him the salary increment. The action by the Administration was not, therefore, motivated by ill will or by considerations extraneous to the interests of the service (cf. Judgement No. 494, Rezene (1990), para. XIX).

IV. As did the JAB, the Tribunal notes, however, that the decision to withhold the Applicant's within-grade salary increment due in 1984 was

characterized by a number of administrative irregularities. Indeed, the JAB concluded that the Resident Representative did not follow the procedure required by section 20300 of the UNDP Personnel Manual and the Tribunal shares the view of the JAB.

The Tribunal further notes that there was an inordinate delay from the date on which the Applicant requested the Secretary-General to review the impugned decision, namely, 5 April 1984, to the date on which the Respondent gave his final reply, namely, 10 June 1988.

V. The Tribunal takes account of the fact that, as reparation for the injury caused to the Applicant, the Administration awarded him, as stated in the letter of 10 June 1988, from the Under-Secretary-General for Administration and Management, "three months' net base salary at local level 6, step IV, at the rate in effect upon [his] separation as appropriate compensation". However, in view of the irregularities and of the inordinate delay referred to above, the Tribunal does not consider that the amount of compensation awarded to the Applicant reflects an accurate assessment of the injury he suffered and, consequently, holds that the Applicant is entitled to additional compensation.

VI. Accordingly, the Tribunal orders the Respondent to pay to the Applicant two months' net base salary at level 6, step IV, over and above the amount which was paid to him following the decision taken by the Secretary-General on the recommendation of the Panel of the JAB.

All other pleas of the Applicant are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Samar SEN
Member

Leliel Mikuin BALANDA
Member

Geneva, 1 July 1992

R. Maria Vicien-Milburn
Executive Secretary